

1 IN THE UNITED STATES DISTRICT COURT
2 FOR MIDDLE DISTRICT OF TENNESSEE
 NASHVILLE DIVISION

3 TENNESSEE BANK & TRUST, a wholly)
owned division of FARMERS BANK &)
4 TRUST COMPANY, an Arkansas state)
bank,)

5 Plaintiff,)
6))

7 v.)

Civil Action No. 3:11-cv-0984

Judge Trauger

Jury Demanded

8 MARION EDWIN LOWERY, CYNTHIA)
LOWERY, MARIAN ELIZABETH)
9 LOWERY SAFFLE, JOHN HARRISON)
LOWERY, WILLIAM HARRISON)
CRABTREE, JR., JIM ENGLAND,)
10 RICHARD INMAN, TOMMY)
CROCKER, BBC HOLDINGS, INC.,)
11 BOC OPERATIONS, LLC, PLF, LLC,)
COMMERCE BANCSHARES, INC.,)
12 PEOPLES STATE BANK OF)
COMMERCE AND OAKLAND)
13 FINANCIAL SERVICES, INC.,)

14 Defendants.)

15 ANSWER, COUNTER-COMPLAINT AND CROSS-CLAIM

16 Come now the Defendants, BOC Operations, LLC, Commerce Bancshares, Inc. and
17 People State Bank of Commerce (hereinafter collectively referred to as “Defendants, Cross-
18 Claimants or Counter-Claimants”), by and through counsel and for their Answer, Counter-
19 Complaint and Cross-Claim, would show and state as follows:

20 **VENUE AND JURISDICTION**

21 1. Defendants admit jurisdiction and venue set for th in Paragraph 1.

22 **THE PARTIES**

23 2. The allegations of Paragraph 2 are admitted.

24 3. The allegations of Paragraph 3 are admitted.

 4. The allegations of Paragraph 4 are admitted.

1 5. The allegations of Paragraph 5 are admitted.

2 6. The allegations of Paragraph 6 are admitted.

3 7. The allegations of Paragraph 7 are admitted.

4 8. The allegations of Paragraph 8 are admitted, except as to residence.

5 9. The allegations of Paragraph 9 are admitted, except as to residence.

6 10. The allegations of Paragraph 10 are admitted, except as to residence.

7 11. The allegations of the second grammatical sentence of Paragraph 11 are
8 admitted. Defendants are without sufficient knowledge or information upon which to
9 form a belief as to the truth of the remaining allegations of Paragraph 11.

10 12. The allegations of Paragraph 12 are admitted except as to the principal place
11 of business which is located at 7122 Nolensville Rd., Nolensville, Tennessee 37135.

12 13. It is admitted that PBLF, LLC is a Tennessee Limited Liability Company. It
13 is denied that it's principal place of business is located at 233 Bedford Way, Franklin,
14 Tennessee. Upon information and belief, Defendants admit that the members of PBLF are
15 Ed Lowery, Cynthia Lowery, Elizabeth Saffle and John Lowery.

16 14. The allegations of paragraph 14 are denied.

17 15. It is admitted that Peoples State Bank of Commerce is a domestic corporation
18 with its principal place of business located at 7122 Nolensville Rd., Nolensville, Tennessee
19 37135. It is further admitted that Commerce Bancshares is the sole stockholder of Peoples
20 State Bank and that Peoples State Bank in turn is the sole stockholder of BOC Operations,
21 LLC.

22 16. It is admitted that Defendant, Oakland Financial Services, Inc., is a Tennessee
23 corporation with its principal place of business located in Cordova, Shelby County,
24 Tennessee. Upon information and belief, it is admitted that Oakland Financial is a majority

1 shareholder of BBC Holdings, Inc. It is admitted that Peoples State Bank is a minority
2 shareholder of BBC Holdings. It is denied that Lowery is a majority shareholder in
3 Oakland Financial.

4 **FACTS**

5 17. Defendants incorporate their responses to Paragraphs 1-16 herein by
6 reference.

7 18. The allegations of Paragraph 18 are admitted.

8 19. Defendants are without sufficient knowledge or information upon which to
9 form a belief as to the truth of the allegations of Paragraph 19.

10 20. The allegations of Paragraph 20 are admitted.

11 21. The allegations of Paragraph 21 are admitted.

12 22. The allegations of Paragraph 22 are admitted.

13 23. It is admitted that at the time of the sale BBC Holdings and BOC Operations
14 were headquartered on real property. It is denied that PBLF was headquartered on the real
15 property.

16 24. The allegations of Paragraph 24 are admitted but it is denied that such was
17 known to these Defendants at the time of the purchase of the property in question by BOC
18 Operations.

19 25. Defendants are without sufficient knowledge or information upon which to
20 form a belief as to the allegations of Paragraph 25.

21 26. The participation agreement speaks for itself and these Defendants neither
22 admit or deny the allegations of Paragraph 26.

23 27. The participation agreement speaks for itself and these Defendants neither
24 admit or deny the allegations of Paragraph 27.

1 28. The participation agreement speaks for itself and these Defendants neither
2 admit or deny the allegations of Paragraph 28.

3 29. Upon information and belief, it is admitted that Ed Lowery either
4 individually or through various companies owned or controlled by him began to
5 experience financial difficulties. Defendants are without sufficient knowledge or
6 information upon which to form a belief as to the truth of the remaining allegations of
7 Paragraph 29.

8 30. Defendants are without sufficient knowledge or information upon which to
9 form a belief as to the truth of the allegations of Paragraph 30.

10 31. Defendants are without sufficient knowledge or information upon which to
11 form a belief as to the truth of the allegations of Paragraph 31.

12 32. It is admitted that BBC Holdings released the real property from the
13 mortgage and that PBLF conveyed the real property to BOC Operations for full and fair
14 value. It is denied that BOC Operations was an entity controlled or owned by Lowery as
15 Lowery had no vote and recused himself from all voting with regard to the property sale
16 to BOC Operations.

17 33. Defendants are without sufficient knowledge or information upon which to
18 form a belief as to the truth of the allegations regarding consideration being paid to BBC
19 Holdings. It is denied that no consideration was paid to PBLF. Defendants are without
20 sufficient knowledge or information upon which to form a belief as to the truth of the
21 remaining allegations of Paragraph 33.

22 34. It is admitted upon information and belief that Lowery has an ownership
23 interest in PBLF and in Commerce Bancshares, Inc., which is the sole shareholder of
24 People's State Bank of Commerce which is the sole shareholder of BOC Operations, LLC.

1 It is admitted that BBC Holdings and BOC Operations were operated out of the same
2 physical location. The remaining allegations of Paragraph 34 are denied.

3 35. These Defendants are without sufficient knowledge or information upon
4 which to form a belief as to the truth of the allegations of Paragraph 35.

5 36. The allegations of Paragraph 36 as they relate to BOC Operations are denied.
6 These Defendants are without sufficient knowledge or information upon which to form a
7 belief as to the truth of the remaining allegations of Paragraph 36.

8 37. The allegations of Paragraph 37 as they relate to Commerce Bancshares,
9 Peoples State Bank and BOC Operations are denied. Defendants are without sufficient
10 knowledge or information upon which to form a belief as to the truth of the remaining
11 allegations of Paragraph 37.

12 38. Defendants are without sufficient knowledge or information upon which to
13 form a belief as to the truth of the allegations of the first grammatical sentence of
14 Paragraph 38. It is denied that the real property represents a source of monies available
15 to repay the note and participation agreement. More particularly, BOC Operations is a
16 bonafide purchaser for value and the participation agreement was not a recorded
17 instrument of which BOC Operations or Peoples State Bank had knowledge.

18 **FIRST CAUSE OF ACTION – BREACH OF CONTRACT**

19 39. Defendants incorporate their response to allegations of Paragraphs 1-38
20 herein by reference.

21 40. Paragraph 40 does not contain factual allegations but legal conclusions.
22 Defendants are without sufficient knowledge or information upon which to form a belief
23 as to the truth of the legal conclusions set forth in Paragraph 40.

24 41. It is admitted that BBC Holdings released its security interest and permitted

1 PBLF to convey the real property to BOC Operations. These Defendants are without
2 sufficient knowledge or information upon which to form a belief as to the truth of the
3 remaining allegations of Paragraph 41.

4 42. Defendants are without sufficient knowledge or information upon which to
5 form a belief as to the truth of the allegations of Paragraph 42.

6 43. As they relate to BOC Operations, the allegations of Paragraph 43 are denied.
7 It is further denied that the Plaintiff is entitled to any relief whatsoever against these
8 Defendants.

9 **SECOND CAUSE OF ACTION – CIVIL CONSPIRACY**

10 44. Defendants incorporate their response to the allegations of Paragraphs 1-43
11 herein by reference.

12 45. The allegations of paragraph 45 are denied as to these Defendants. These
13 Defendants are without sufficient knowledge or information upon which to form a belief
14 as to the truth of the remaining allegations.

15 46. The allegations of paragraph 46 are denied as to these Defendants. These
16 Defendants are without sufficient knowledge or information upon which to form a belief
17 as to the truth of the remaining allegations.

18 47. The allegations of paragraph 47 are denied as to these Defendants. These
19 Defendants are without sufficient knowledge or information upon which to form a belief
20 as to the truth of the remaining allegations.

21 48. The allegations of paragraph 48 are denied as to these Defendants. These
22 Defendants are without sufficient knowledge or information upon which to form a belief
23 as to the truth of the remaining allegations.

24 49. The allegations of paragraph 45 are denied as to these Defendants. These

1 Defendants are without sufficient knowledge or information upon which to form a belief
2 as to the truth of the remaining allegations. It is denied that the Plaintiff is entitled to any
3 relief whatsoever as it relates to these Defendants.

4 **THIRD CAUSE OF ACTION – FRAUD**

5 50. Defendants incorporate their response to the allegations of paragraphs 1-49
6 herein by reference.

7 51. The allegations of paragraph 51 are denied as to these Defendants. These
8 Defendants are without sufficient knowledge or information upon which to form a belief
9 as to the truth of the remaining allegations.

10 52. The allegations of paragraph 52 are denied as to these Defendants. These
11 Defendants are without sufficient knowledge or information upon which to form a belief
12 as to the truth of the remaining allegations.

13 53. The allegations of paragraph 53 are denied as to these Defendants. These
14 Defendants are without sufficient knowledge or information upon which to form a belief
15 as to the truth of the remaining allegations.

16 54. The allegations of paragraph 54 are denied as to these Defendants. These
17 Defendants are without sufficient knowledge or information upon which to form a belief
18 as to the truth of the remaining allegations.

19 55. The allegations of paragraph 55 are denied as to these Defendants. These
20 Defendants are without sufficient knowledge or information upon which to form a belief
21 as to the truth of the remaining allegations.

22 56. The allegations of paragraph 56 are denied as to these Defendants. These
23 Defendants are without sufficient knowledge or information upon which to form a belief
24 as to the truth of the remaining allegations.

1 57. The allegations of paragraph 57 are denied as to these Defendants. These
2 Defendants are without sufficient knowledge or information upon which to form a belief
3 as to the truth of the remaining allegations. It is denied that the Plaintiff is entitled to any
4 relief whatsoever as to these Defendants.

5 **FOURTH CAUSE OF ACTION – FRAUDULENT TRANSFER**

6 58. Defendants incorporated their response to the allegations of paragraphs 1-57
7 herein by reference.

8 59. It is admitted that the property was transferred for the sum of \$1,900,000.00
9 to BOC operations. The remaining allegations are denied.

10 60. It is denied that Lowery owns a majority interest in the parent company of
11 BOC Operations and denied that Lowery controlled or exercised control over the
12 transaction. More specifically all matters related to the sale of the property were approved
13 by a board of directors with Lowery abstaining from any participation in the vote or
14 transaction by BOC or any entity on the buyer side of the transaction.

15 61. Defendants are without sufficient knowledge or information upon which to
16 form a belief as to the truth of the allegations of paragraph 61.

17 62. Defendants are without sufficient knowledge or information upon which to
18 form a belief as to the truth of the allegations of paragraph 62.

19 63. The allegations of paragraph 63 are denied.

20 64. The allegations of paragraph 64 are denied.

21 65. The allegations of paragraph 65 are denied.

22 66. The allegations of paragraph 66 are denied. It is denied that the Plaintiff is
23 entitled to any relief whatsoever from these Defendants.

1 **FIFTH CAUSE OF ACTION – CONSTRUCTIVE TRUST**

2 67. Defendants incorporate their response to the allegations of paragraphs 1-66
3 herein by reference.

4 68. The allegations of paragraph 68 are denied.

5 69. The allegations of paragraph 69 are denied.

6 70. The allegations of paragraph 70 are denied.

7 71. The allegations of paragraph 71 are denied. It is denied that the Plaintiff is
8 entitled to any relief whatsoever from these Defendants.

9 **SIXTH CAUSE OF ACTION – CONVERSION**

10 72. Defendants incorporate their response to the allegations of paragraphs 1-71
11 herein by reference.

12 73. Defendants are without sufficient knowledge or information upon which to
13 form a belief as to the truth of the allegations of paragraph 73. It is denied that any such
14 interest is superior to a bonafide purchaser for value such as BOC Operations since such
15 interest was not recorded and was unknown to BOC.

16 74. The allegations of paragraph 74 are denied as to these Defendants. These
17 Defendants are without sufficient knowledge or information upon which to form a belief
18 as to the truth of the remaining allegations.

19 75. The allegations of paragraph 74 are denied as to these Defendants. These
20 Defendants are without sufficient knowledge or information upon which to form a belief
21 as to the truth of the remaining allegations. It is denied that the Plaintiff is entitled to any
22 relief whatsoever as to these Defendants.

23 76. Any and all allegations not previously admitted, explained or denied are
24 hereby expressly denied as if denied more fully hereinabove.

1 **AFFIRMATIVE DEFENSES**

2 77. Defendants aver and allege that BOC Operations was a bonafide purchaser
3 for value and that it holds such property free and clear of any interest of the Plaintiff or any
4 other persons or entity other than these Defendants.

5 78. Defendants aver and alleges that Plaintiff was negligent in failing to record
6 its security interest on the public records of Williamson County, Tennessee and such failure
7 bars any recover against these Defendant or the property owned by BOC Operations.

8 **COUNTER COMPLAINT**

9 Now assuming the role of Counter Plaintiff, Defendants aver and allege as follows:

10 79. Commerce Bancshares, Inc. ("CB") is the sole shareholder and parent
11 company of Peoples State Bank of Commerce ("Peoples"). Peoples is the sole shareholder
12 and parent of BOC Operations, LLC ("BOC").

13 80. Peoples transferred the sum of \$1,900,000.00 to BOC its wholly owned
14 subsidiary for the purchase of the real property referenced in the complaint.

15 81. BOC purchased the property simultaneous with the transfer from Peoples
16 based upon an agreed price with PBLF which was determined on the basis of an appraisal
17 to the property.

18 82. The property was transferred by warranty deed from PBLF to BOC and
19 contained, *inter alia*, a warranty of title.

20 83. Upon information an belief, the Plaintiff was aware of the transfer and failed
21 to advise, CB, Peoples or BOC of any objection thereto.

22 84. At the time of the transfer, any interest of the Plaintiff was unrecorded in the
23 public records and the conditions and covenants contained in the participation agreement
24 were unknown to CB, Peoples and BOC.

85. At no time during the transfer or negotiations for the transfer did Ed Lowery participate in any voting on behalf of CB, Peoples or BOC.

86. The sale was an arms length transaction and commercially reasonable in both form and substance.

87. CB, Peoples and BOC aver and allege that BOC is a bonafide purchaser of the property and holds title to the property free and clear of any interest of the Plaintiff.

88. CB, Peoples and BOC aver and allege that as a result of this case and the lis pendens filed by the Plaintiff in the Register's Office of Williamson County, Tennessee that there now exists a claim against the property and a cloud upon the title.

89. CB, Peoples and BOC aver and allege that a controversy exists as to the ownership and interests in a certain parcel of real estate described in the complaint within the meaning of Rule 57, Fed. R. Civ. P. and 28 U.S.C. § 2201.

90. CB, Peoples and BOC aver and allege that this Court should adjudicate and declare the rights as between the Plaintiff and CB, Peoples and BOC to the property in question and more particularly declare that the property is owned by BOC free and clear of any claims of the Plaintiff.

CROSS-CLAIM

Now, additionally assuming the role of Cross Plaintiffs, Commerce Bancshares, Inc. (“CB”), Peoples State Bank of Commerce (“Peoples”) and BOC Operations, LLC (“BOC”) sue PBLF, LLC (“PBLF”), BBC Holdings, Inc. (“BBC”), Marion Edwin Lowery (“Lowery”), Marian Elizabeth Lowery Saffle (“Saffle”), and Harrison Crabtree (“Crabtree”) and aver and allege as follows:

91. The original complaint in this matter asserts various fraudulent and other wrongful acts on the part of PBLF, BBC, Lowery, Saffle and Crabtree, (hereinafter

collectively referred to as "Cross Defendants").

92. The warranty deed conveying title to the property described in the complaint was executed by Saffle on behalf of PBLF on the 28th day of May 2010. The deed is of record in book 5065 page 612 of the Register's Office of Williamson County, Tennessee.

93. Upon information and belief, and as alleged in the complaint, PBLF did not have clear and marketable title to the property at the time of the transfer and such fact was imputed to PBLF as a result of the knowledge of Lowery. Saffle was aware of this fact as well at the time that the warranty deed was execute but failed to disclose the same to the CB, Peoples or BOC.

94. On the 20th day of May 2010, BBC by and through Crabtree executed a partial release of a Deed of Trust and Conditional Assignment of Rents from PBLF to BBC on the subject property. The partial release is of record in the Register's Office of Williamson County, Tennessee in book 5065, page 610 the terms of which are incorporated herein by reference. At the time of the execution of the release, Saffle, Lowrey, PBLF, BBC and Crabtree were aware that such was in violation of the covenants set forth in the participation agreement between BBC and the original Plaintiff.

95. Saffle, Lowrey, PBLF, BBC and Crabtree had a duty to disclose the fact that BBC did not have the authority to release the property.

96. Neither Saffle, Lowrey, PBLF, BBC or Crabtree disclose the existence of hte participation agreement or the fact that the release violated the terms of the agreement.

97. Peoples in the transfer of funds to BOC and BOC in the tender of the funds to PBLF for the purchase of the property were relying upon the release, the deed and the conveyance of the real property.

98. CB, Peoples and BOC aver and allege that the acts and omissions of the

1 Counter Defendants in causing the release of the property from the trust deed and the
2 transfer by deed in the manner alleged in the original complaint and the previous
3 paragraphs damaged them in the amount of the purchase price of \$1,900,000.00 plus
4 interest and expenses related to the negotiation, sale and closing of the property in
5 question.

6 99. CB, Peoples and BOC aver and allege that to the extent that Plaintiff is
7 entitled to recover any sums whatsoever from them or against that property that they are
8 entitled to indemnity under the terms of the warranty deed and damages to the same
9 extent from the Counter Defendants based upon the original allegations set forth in the
10 Complaint.

11 100. Alternatively and additionally, CB, Peoples and BOC aver and allege that as
12 a result of the misrepresentations made by BBC, Crabtree, PBLF and Saffle that it entered
13 into the transaction to purchase the real estate described in the complaint and that it
14 justifiably relied upon the representations contained in the release and warranty deed.

15 101. CB, Peoples and BOC aver and allege that as a result of the
16 misrepresentations it has been damaged and is entitled to recover to the extent of such
17 damage as may be determined at the trial in this cause including but not limited to its
18 attorneys fees in defending this action which would not have occurred but for the actions
19 of the Counter Defendants.

20 102. Alternatively and additionally, based upon the allegations set forth in the
21 original complaint that PBLF and Saffle have breached the warranty to title granted to
22 BOC.

23 103. BOC avers and alleges that such breach has caused and is continuing to cause
24 damage to BOC inasmuch as BOC has been required to defend its title to the property for

1 which it is entitled to recover.

2 Wherefore, Commerce Bancshare, Inc., Peoples State Bank of Commerce and BOC
3 Operations, LLC pray:

4 A. That the Court adjudicate and declare the rights of the BOC and the Plaintiff
5 to the real estate more specifically declaring that BOC Operations, LLC is the true and
6 lawful owner of the real estate described in the property free and clear of any interest of
7 the Plaintiff or any other person or entity whatsoever.

8 B. That the original complaint be dismissed as it relates to Commerce Bancshare,
9 Inc., Peoples State Bank of Commerce and BOC Operations, LLC

10 C. That Commerce Bancshare, Inc., Peoples State Bank of Commerce and BOC
11 Operations, LLC have a judgment against BBC, Crabtree, Lowery, Saffle and PBLF for any
12 and all sums it is obligated to pay to the original plaintiff.

13 D. That BOC Operations, LLC be awarded a judgment for all sum expended by
14 it in defending this action or prosecuting the counter complaint and cross claims.

15 E. For such other and further relief to which Commerce Bancshare, Inc., Peoples
16 State Bank of Commerce and BOC Operations, LLC may be entitled, including but not
17 limited to prejudgment interest.

18 **COMMERCE BANCSHARE, INC., PEOPLES STATE BANK OF COMMERCE AND**
19 **BOC OPERATIONS, LLC DEMAND A JURY TO TRY THIS CAUSE.**

Respectfully submitted,

/s/ John D. Schwalb
JOHN D. SCHWALB (BPR No. 011671)
john_schwalb@msn.com
ERNEST W. WILLIAMS (BPR No 007250)
ewwlaw@comcast.net
WILLIAMS & SCHWALB, PLLC
108 Fourth Avenue South, Suite 208
Franklin, Tennessee 37064
(615) 794-7100
(615) 794-6333 facsimile

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served in accordance with the local rules of court and guidelines governing electronic case filing and the Federal Rules of Civil Procedure upon:

Heather J. Hubbard, Esq.
heather.hubbard@wallerlaw.com
WALLER, LANSDEN, DORTCH & DAVIS, LLP
511 Union Street, Suite 2700
Nashville, Tennessee 37219
Attorneys for Plaintiff

Gary D. Jiles, Esq.
gjiles@mjcfirm.com
Matthew K. Brown, Esq.
mbrown@mjcfirm.com
MILLAR, JILES CULLIPHER, LLP
The Frauenthal Building
904 Front Street
Conway, Arkansas 72032
Attorneys for Plaintiff

Joshua R. Denton, Esq.
jdenton@bassberry.com
Kinika L. Young
kyoung@bassberry.com
BASS, BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, Tennessee 37201
Attorneys for Oakland Financial Services, Inc.

1 J. Gregory Grisham, Esq.
greg.grisham@leitnerfirm.com

2 Frank L. Day, Esq.
frank.day@leitnerfirm.com

3 **LEITNER, DOOLEY, WILLIAMS & NAPOLITAN, PLLC**
Brinkley Plaza Suite 800
4 80 Monroe Avenue
Memphis, Tennessee 38103
5 *Attorneys for Oakland Financial Services, Inc.*
BBC Holdings, Inc., Crocker, England and Inman

6
7 Brian F. Walthart, Esq.
Brian.walthart@leitnerfirm.com
LEITNER, DOOLEY, WILLIAMS & NAPOLITAN, PLLC
8 Bank of America Plaza
414 Union Street, Suite 1900
9 Nashville, Tennessee 37219
Attorneys for Oakland Financial Services, Inc.
10 *BBC Holdings, Inc., Crocker, England and Inman*

11 Luther Wright, Jr., Esq.
luther.wright@ogletreedeakins.com
12 **OGLETREE, DEAKINS, NASH, SMOAK &**
STEWART, P.C.
13 SunTrust Plaza
401 Commerce Street, Suite 1200
14 Nashville, Tennessee 37219-2446
Attorneys for Crabtree

15 Cynthia Lowery
16 384 Lake Valley Drive
Franklin, Tennessee 37069

17 Marion Edwin Lowery
18 384 Lake Valley Drive
Franklin, Tennessee 37069

19 John Harrison Lowery
20 384 Lake Valley Drive
Franklin, Tennessee 37069

21 PLBF, LLC
22 c/o Harland Dodson, III, Registered Agent
1306 6th Avenue North
23 Nashville, Tennessee 37208

1 Marion Elizabeth Lowery Saffle
2 613 Patriot Lane
3 Franklin, Tennessee 37064

4 this 16th day of December 2011.

5 /s/ John D. Schwalb
6 **JOHN D. SCHWALB**
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24